(10)

No. 98-531

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD,

Petitioner,

v.

COLLEGE SAVINGS BANK and UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF OHIO, ALABAMA, CALIFORNIA, COLORADO, DELAWARE, HAWAII, ILLINOIS, INDIANA, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, UTAH, WYOMING AND THE COMMONWEALTHS OF PENNSYLVANIA AND VIRGINIA IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI*

Amici State of Ohio and 25 other States write in support of Petitioner Florida Prepaid Postsecondary Education Expense Board, urging this Court to hold that Congress lacks authority to abrogate a State's sovereign immunity from suit in federal court in the context of a patent infringement claim. The States have an obvious interest in the case, not only to protect their Eleventh Amendment immunity in this particular context, but also to point out the far-reaching implications of an adverse decision. At least 19 other States have programs similar to Florida's, and many of these have been threatened with similar lawsuits from Respondent College Savings Bank ("CSB"). The States vigorously contest the allegations of infringement by CSB. *See* Appendix A.

The argument advanced by Respondent, and adopted by the court below, is essentially that the assertion of Eleventh Amendment immunity amounts to a violation of due process, thereby giving Congress the power to abrogate the States' Eleventh Amendment immunity under section five of the Fourteenth Amendment. This argument, were it to prevail in this Court, would mean that Congress could abrogate Eleventh Amendment immunity in virtually all circumstances– a result that would eviscerate this Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). The *Amici* States therefore submit this brief for the Court's consideration.

SUMMARY OF ARGUMENT

In this case, a Florida state agency is alleged to have infringed a patent granted to a private entity under federal law. The States have made their courts available to hear patent infringement claims against the States. The particular form of process that Florida has made available is a "takings" claim on the ground that infringement of a patent, if proved, is a taking of property deserving of just compensation. *See Jacob's Wind Electric Co., Inc. v. Florida Department of Transportation*, 626 So. 2d 1333 (Fla. 1993). Either this form of process or one involving a tort claims act exists in almost every State in the Union. *See* Appendix B. Thus, there is virtually no State that fails to offer a process by which a patent holder may seek a remedy from an alleged infringement. Nonetheless, Congress has attempted to make the States amenable to suit in federal court, notwithstanding the States' traditional Eleventh Amendment immunity from suit in federal court against claims brought by private parties.

It is clear from *Seminole Tribe* that Congress lacks power under the Patent Clause to abrogate the States' immunity from suit in federal court. Consequently, CSB and the United States argue that Congress may rely on its power to abrogate state immunity pursuant to section five of the Fourteenth Amendment. But this argument is unavailing. Congress may invoke its authority under section five of the Fourteenth Amendment only to remedy violations of the Amendment. But there is no violation of the Fourteenth Amendment when the States make their own courts available to remedy any patent infringement committed by state agencies or instrumentalities. Thus, when the States are prepared to entertain patent infringement claims in their own courts, there is no basis for Congress' exercising section five authority to abrogate the States' immunity from suit in federal court.

In establishing this important proposition, we do not mean to suggest that a State's ability to assert immunity from suit in federal court in a patent infringement case is necessarily contingent on the availability of a comparable remedy in state court. On the contrary, it may well be true that States have the sovereign right to remain immune from suit in both state and federal court, even against claims arising under federal laws enacted pursuant to Article I. *See* States' *Amicus* Brief, *Alden v. Maine*, No. 98-436, *cert. granted*, 119 S. Ct. 443 (November 9, 1998). But the States need not rely on that proposition to defend their Eleventh Amendment immunity in this case. Here, the State of Florida, as well as other States, have made a remedy available, and in this context it is abundantly clear that the States have satisfied due process. *See* Appendix B. Accordingly, Congress cannot contend that it must abrogate the States' immunity from suit in federal court to remedy a due process violation.

Furthermore, the Patent Remedy Act is a disproportionate measure under the standard set forth in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). Finally, if Respondents' view prevails it will threaten the practical effect of the Court's holding in *Seminole Tribe*.

ARGUMENT

I. CONGRESS MAY NOT RELY ON SECTION FIVE OF THE FOURTEENTH AMENDMENT TO ABROGATE ELEVENTH AMENDMENT IMMUNITY IN A PATENT INFRINGEMENT CASE WHEN THE STATES ARE WILLING TO ENTERTAIN SUCH CASES IN THEIR OWN TRIBUNALS.

In *Seminole Tribe*, this Court held that Congress lacks the power under the Commerce Clauses of Article I, §8 to abrogate a state's Eleventh Amendment sovereign immunity. The holding and reasoning of *Seminole Tribe* apply just the same to other congressional powers enumerated in Article I, §8, including the powers granted to Congress in the Patent Clause. Indeed, both Respondent CSB and Respondent the United States concede this much, arguing instead that Congress may invoke its power to abrogate Eleventh Amendment immunity under section five of the Fourteenth Amendment to subject States to patent infringement suits in federal court.

This argument, however, cannot prevail for two very simple reasons. First, congressional power under section five of the Fourteenth Amendment is limited to remedying violations of that Amendment's provisions. Second, and more important in the context of this case, there can be no Fourteenth Amendment violation for Congress to remedy when the States are willing to entertain patent actions in their own courts.

A. Congress Has Power Under Section Five Of The Fourteenth Amendment Only To Remedy Violations Of The Amendment.

This Court recently reviewed the scope of congressional power under section five of the Fourteenth Amendment in *City of Boerne*, 117 S. Ct. at 2157. There, in striking down the Religious Freedom Restoration Act ("RFRA"), the Court explained that Congress' authority "extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment." *Id.* at 2164. In contrast to this "remedial" power, however, Congress lacks authority "to decree the substance of the Fourteenth Amendment's restriction on the State." *Id.* Otherwise, "what Congress would be enforcing would not longer be, in any meaningful sense, 'the provisions of the [Fourteenth Amendment].'" *Id.* Or, as the Court aptly put the point: "Congress does not enforce a constitutional right by changing what the right is." *Id.*

These principles, of course, were not new to *City of Boerne*. On the contrary, they were first enunciated by this Court shortly after ratification of the Fourteenth Amendment. In the *Civil Rights Cases*, 109 U.S. 3 (1883), for example, the Court held that section five gives Congress no authority over matters that do not involve actual violations of section one of the Amendment. Instead, "any legislation by Congress in the matter must necessarily be corrective in its character, adopted to counteract and redress the operation of such prohibited state laws or proceedings of state officers." *Id.* at 18.

In a passage directly relevant to this case, the Court stated: "It is absurd to affirm that, because the rights of life, liberty, and property . . . are, by the Amendment, sought to be protected against invasion on the part of the State without

due process of law, Congress may, therefore, provide due process for their vindication in every case . . . ." *Id.* at 13. In other words, Congress may not anticipate the need for due process by legislating whatever civil remedies it believes would most provide due process. Instead, Congress may only redress actual violations of due process by the States. As the Court said, under section five, Congress is limited to "*corrective legislation*, that is, such as may be necessary and proper for counteracting [State action prohibited by the Amendment itself]." *Id.* at 13-14. (emphasis added)

B. No Fourteenth Amendment Violation Exists When A State Provides A Remedy For Patent Infringement Claims Against Itself In Its Own Courts.

Applied to the circumstances of this case, these well-settled principles mean that Congress has no power to subject the States to a particular form of remedy in federal court, just because Congress believes this remedy would be the best possible form of process, if the States have done nothing to deny due process to anyone. Yet that is precisely what Congress is trying to do in this case. When a State is alleged to have infringed a patent, there is no violation of due process unless and until the State itself fails to provide a fair and adequate proceeding in which the patent owner can present the allegations for adjudication.

It is well established that a State has not violated due process just because there is a pending allegation that the State has committed a tort of some kind. *See, e.g., Parratt v. Taylor*, 451 U.S. 527, 540 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986) (holding that negligence does not qualify as a deprivation for purposes of the Due Process Clause); *see also Hudson v.*

Palmer, 468 U.S. 517 (1984). Instead, a due process violation occurs, if at all, only if a State fails to afford the tort claimant *any* procedure for presenting the tort claim. But the State in *Parratt* did provide a tort remedy for "persons who believe they have suffered a tortious loss at the hands of the State," and this Court held that because this remedy "could have fully compensated the respondent for the property loss he suffered," it was "sufficient to satisfy the requirements of due process." 451 U.S. at 543-44.

Similarly, *Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), involved the attempt to bring a takings claim in federal court before the landowner had sought just compensation pursuant to the inverse condemnation procedures provided by the State. The Court held that the takings claim was premature "because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking." *Id.* at 195. In other words, the Court held that there was no constitutional violation for a federal court to remedy until the state court proceeding was complete and shown to be inadequate (which had not occurred in that case). "[T]he State's action is not 'complete' in the sense of causing constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.'" *Id.*, quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984).

The same point is true in this case. Respondent CSB, a bank, claims that Petitioner, a state agency charged with the responsibility of providing financial aid to college-bound residents of the State, has infringed a patent owned by the bank. Petitioner, however, contests the infringement claim, believing that its college savings program does not infringe on any patent rights owned by the bank. Thus, the allegations of

patent infringement here remain very much in dispute. The State of Florida, however, has made available in its own courts a process for adjudicating claims of patent infringement against the State. *Jacob's Wind*, 626 So. 2d at 1333. Indeed, the process that Florida has made available is the same one it uses any time a person alleges that the State has taken property without just compensation. In other words, it is similar to the kind of inverse condemnation procedure that was also available in *Williamson*.

Given the availability of a state court proceeding to vindicate a patent infringement claim, there has been no taking of property without just compensation. As in *Williamson*, there has been no violation of the Fourteenth Amendment cognizable in federal court. Similarly, because of the availability of a remedy for patent infringement in state court, Florida has not violated due process, as *Parratt* and its progeny make clear. In sum, "the Constitution is satisfied by meaningful postdeprivation process," *Williamson*, 473 U.S. at 195, which is precisely what Florida has provided.

Indeed, virtually all the States have waived their sovereign immunity to some extent in their own courts, or at least have provisions for "takings," "inverse condemnation," or tort claims in some forum. *See* Appendix B. These provisions could be used, as they were in Florida, to provide due process against an allegedly infringing State.

C. A Congressional Desire For Federal Court Jurisdiction Cannot Override State Sovereign Immunity In The Absence Of A Fourteenth Amendment Violation.

Because there is no Fourteenth Amendment violation in the context of this case, there is nothing for Congress to

remedy pursuant to its authority under section five of the Fourteenth Amendment. Under the principles espoused in *City of Boerne* and the *Civil Rights Cases*, as described in Point I.A. above, Congress may not require Florida or any other State to submit to a federal court procedure for adjudicating a patent infringement claim against the State just because Congress thinks that the federal process would be preferable to the state-court process that the State already has made available. Yet this is precisely what the United States would have this Court believe.

In its brief in opposition to certiorari (at pp. 5-6), the United States argued: "By affording a post-deprivation remedy for patent infringements committed by state entities, the Patent Remedy Act secures [due process]." But this argument overlooks the fact that Florida, by providing its own post-deprivation remedy for patent infringements committed by its agencies, already itself secures due process. Moreover, because Florida and virtually all other States already provide due process in this context, there is no basis for Congress to exercise section five authority.

The United States' argument essentially boils down to nothing more than that Congress would prefer its own remedy in federal court to the remedy that the States provide in state courts. But this mere preference for a federal court remedy cannot be the basis for the exercise of congressional authority under section five. On the contrary, in both *City of Boerne* and the *Civil Rights Cases*, Congress wanted to create new federal causes of action to supersede state laws. In both those cases, however, this Court ruled that this congressional desire for new federal law was an inadequate basis for legislation under section five: Congress, this Court emphasized, is limited to taking action against Fourteenth Amendment violations. As there are no Fourteenth Amendment violations here, given the availability of the state

court process, Congress has no authority under section five to insist upon its preferred federal court process.

The United States also makes much of a supposed need for national uniformity in the enforcement of patent laws. See U.S. Br. in Op. at 7 ("The substantial benefits of [exclusive Federal Circuit jurisdiction over patent appeals] would be lost in a significant class of cases if Congress were required to leave enforcement of patent rights against state entities to state courts, and disuniformities in the application of federal patent law would be the likely result.") But this concern is far overstated—indeed, entirely misplaced—in the context of patent infringement claims against the States. First of all, the history of patent infringement litigation against the States suggests there is hardly any cause for concern at all: when Congress attempted to abrogate the States' Eleventh Amendment immunity in the Patent Remedy Act, it could only identify eight patent infringement suits against the States in over a century between 1887 and 1990. *See* Pet. App. A at 21-23; *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 148 F.3d 1343 at 1353 (1998).

Moreover, even if the volume of patent infringement claims against the States were significant, it would still pale in comparison with the number of cases against non-State parties. In all of these other cases, there would be no issue of Eleventh Amendment immunity, and Federal Circuit jurisdiction would still obtain. Thus, the interest in uniformity would still prevail in all these cases. Furthermore, precisely because the Federal Circuit would still have exclusive appellate authority over the vast bulk of patent litigation, the weight of the Federal Circuit's authority would strongly be felt in the few cases that would be litigated against the States in state courts. No state court, in other words, would decide a patent case without heeding the views of the Federal

Circuit, and thus as a practical matter the goal of national uniformity would prevail in virtually every case. Moreover, on the slight chance that a state supreme court were to step out of line, there would still be the possibility of review in this Court to preserve the necessary national uniformity. Thus, it is simply not credible to claim, as the United States has, that there would be a significant threat of disuniformity if patent infringement claims against the States must be litigated in state courts.

In any event, even if the threat of some disuniformity were realistic (which it is not), that consequence would be the inevitable price of adhering to a system of federalism that honors the States' sovereign immunity from suit in federal court, except in cases involving Fourteenth Amendment violations. Simply put, the congressional desire for uniform treatment of patent infringement claims, while perhaps understandable, is not a basis for defeating the States' constitutional right to sovereign immunity from suit in federal court. Respecting the dignity of the States as sovereign requires that these suits proceed, if at all, only in state courts. "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe*, 517 U.S. at 72-73.

D. Congress May Not Assert Exclusive Federal Court Jurisdiction Over Patent Infringement Claims As A Predicate For Exercising Section Five Authority.

The Federal Circuit in this case cast doubt on the availability of a state court proceeding to hear a patent infringement claim. 148 F.3d at 1350 n.2. The court based

this doubt on the fact that the Patent Remedy Act purports to provide exclusive federal court jurisdiction over patent infringement claims. *Id.* This exclusivity of federal jurisdiction is obviously valid with respect to infringement claims against non-State defendants, but it cannot serve as a basis for abrogating state immunity from suit in federal court.

Congress may not invoke authority under Article I to preempt state court jurisdiction over suits against the States because, after *Seminole Tribe*, Congress has no authority under Article I to impose federal jurisdiction on the States. Thus, the congressional effort to provide for exclusive federal jurisdiction must yield, as far as state defendants are concerned, to the paramount constitutional value of Eleventh Amendment immunity. In other words, the state court process for claims against the State remains valid under the Supremacy Clause because Congress lacks authority under the Constitution to supersede this process with a federal court proceeding against the States.

Nor may Congress attempt to manufacture a due process violation by claiming that exclusive federal jurisdiction defeats the State's authority to provide a state court remedy that would avoid a Fourteenth Amendment violation. This kind of reasoning would be exactly backwards. The availability of the state forum defeats the need for federal jurisdiction here. Congress cannot declare the state forum null and void just to concoct a basis for exercising section five power. Section five does not support the imposition of federal jurisdiction on the States in the first place. Thus, Congress may not rely on section five to erase the due process available in state court—the due process which obviates any basis for congressional action against the States.

In sum, Congress' efforts to make federal court jurisdiction in patent cases exclusive has no applicability in the specific context of suits against the States.

II. CONGRESS' ATTEMPT TO SUBJECT STATES TO FEDERAL JURISDICTION IN PATENT CASES DEMONSTRATES A LACK OF "CONGRUENCE BETWEEN THE MEANS USED AND THE ENDS TO BE ACHIEVED."

The Patent Remedy Act has failed to honor another important teaching of *City of Boerne*. In that case, the Court observed that when Congress exercises its section five powers, "there must be a congruence between the means used and the ends to be achieved." *Id.*

The *City of Boerne* Court compared RFRA to other proper exercises of Congress' section five enforcement authority:

> Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.

Id., 117 S. Ct. at 2169-70. Likewise, the Patent Remedy Act cannot be considered remedial or preventive legislation. It abrogates the sovereign immunity of the States without allowing the States themselves to vindicate the injury

complained of, and is unsupported by evidence of widespread violation of either due process or the patent laws by the States.

In this case, as in *City of Boerne*, there is no indication in the legislative history of widespread or egregious violation of patent rights by the States. Unlike the voting rights cases, where a long history of egregious violations of a federal right preceded passage of the legislation, there is no indication that Congress must discipline renegade States engaged in unconstitutional activity.

On surveying the legislative record of the Patent Remedy Act, the best that could be said about State abuse of the patent laws was that there were "significant instances" of alleged patent infringement by state entities. 148 F.3d at 1353. Even the lower court admitted that "[t]he legislative record of the Patent Remedy Act contains indications that the extent of previous patent infringement by states had not yet risen to emergency levels." *Id; see also* Patent Remedy Clarification Act: Hearings on H.R. 3886 before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House of Representatives Comm. on the Judiciary, 101st Cong. 22 (1990)(statement of Rep. Kastenmeier)("We do not have any evidence of massive or widespread violation of patent laws by the States, either with or without this immunity.") Indeed, only eight instances of lawsuits against States for patent infringement could be found between 1887 and 1990. Pet. App. A. 21-22; 148 F.3d at 1353.

Respondent United States argues that Congress "need not wait for patent infringement to reach emergency levels." United States Br. in Op., p. 7. But it would seem that eight instances in over one hundred years is hardly a cause for concern, let alone alarm.

Even more important, however, there was no finding whatsoever that the States had refused to provide *due process* to patent holders. Patent infringement, in and of itself, is not a constitutional violation. Accordingly, even if there had been egregious violation of the patent laws by the States, Congress could not act unless the States had refused to provide due process.

On this thin reed hangs Congress' justification for abrogating the States' Eleventh Amendment immunity in the Patent Remedy Act. As with RFRA, the Patent Remedy Act "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections." *City of Boerne*, 117 S. Ct. at 1270. The decision below must be reversed.

III. RESPONDENTS' ARGUMENT, IF ACCEPTED BY THIS COURT, HAS THE POTENTIAL TO EVISCERATE THE COURT'S HOLDING IN *SEMINOLE TRIBE*.

In *Seminole Tribe*, the Court held that Congress has no power under Article I of the Constitution to abrogate the States' Eleventh Amendment immunity from suit in federal court. "[T]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe*, 517 U.S. at 72-73.

In this case, Congress has passed a statute giving individuals a property right and then, to "enforce" the Due Process Clause, abrogated the States' Eleventh Amendment

immunity with respect to suits to enforce that right, despite the fact that no constitutional right had been violated, or was even threatened. This potential expansion of the Fourteenth Amendment completely circumvents the principles articulated in *Seminole Tribe*, and, as a practical matter, could reduce the Eleventh Amendment to nothing. In other words, what this Court took away from Congress under Article I, Respondents would give back under the Fourteenth Amendment.

Respondents' theory has implications well beyond patent law. If Respondents' view prevails, there is little limit to the reach of the Congressional power for making the States amenable to suit in federal courts. An analysis similar to that employed by the Federal Circuit could be used to permit Congressional abrogation of state immunity in all of the vast number of contexts arising from Article I, even where no violation or potential violation of a constitutional right exists.

Indeed, arguments similar to that employed by CSB and adopted by the Federal Circuit have already been used in a number of cases in which Congress has tried to abrogate the States' immunity under similar Article I powers. For example, an almost identical argument has been made in the copyright context: in *Chavez v. Arte Publico Press*, 139 F.3d 504 (5th Cir. 1998), *reh'g granted*, the Fifth Circuit addressed whether a claim similar to the one at issue here could be brought in federal court to vindicate an alleged copyright violation. Another similar claim was rejected in the bankruptcy context by the Fourth Circuit. *In re Creative Goldsmiths*, 119 F.3d 1140, 1146-47 (4th Cir. 1997); *see also In re Sacred Heart Hospital of Norristown*, 133 F.3d 237 (3d Cir. 1998); *In re Light*, 1996 U.S. App LEXIS 16575, (9th Cir. June 20,1996).

Even more to the point, Respondents' theory would nullify many Eleventh Amendment cases decided by this

Court. The Court's recent decision in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), is illustrative on that point. That case, like this one, involved a claim that a State had violated another party's property rights. There the specific property claim was an Indian tribe's claim to aboriginal land. The Court in *Coeur d'Alene* held that the Eleventh Amendment was clearly a bar to the lawsuit. If Respondents' theory were to prevail, the tribe in *Coeur d'Alene* could have eliminated the Eleventh Amendment bar simply by alleging that the State's failure to provide it a federal forum constituted a violation of the Due Process Clause of the Fourteenth Amendment. Yet such a theory was entirely contrary to the tenor of this Court's consideration of the Eleventh Amendment in *Coeur d'Alene*.

This Court in *Coeur d'Alene*, as in *Seminole Tribe*, properly protected the States' sovereign right to be immune from suit in federal court. Consistent with those decisions, the Court in this case should rule likewise that Congress has no power to force States to defend patent infringement claims in federal court. The attempt at invoking the Fourteenth Amendment, to circumvent the limits on Congress' powers under Article I, should not alter this conclusion. This point is especially true where, as here, States are prepared to provide adequate remedies in state court. In this circumstance, it is abundantly evident that there is no basis for invoking the Due Process Clause of the Fourteenth Amendment to permit an abrogation of the States' sovereign rights to Eleventh Amendment immunity. Thus, in this case the Fourteenth Amendment affords no basis to disturb the fundamental principles of Eleventh Amendment immunity articulated in *Seminole Tribe* and *Coeur d'Alene*.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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APPENDIX A

STATE PROGRAMS FOR PREPAID TUITION

State	Law	Litigation
Alabama	Ala. Code § 16-33C-6 (1991)	threatened by CSB
Alaska	Alaska Stat. § 14.40.803-14.40.817 (1991)	
Arkansas	Ark. Stat. Ann. § 6-62-901 *et seq.* (start in '99) (1977)	
Colorado	Colo. Rev. Stat. § 23-3.1 *et seq.*	
Florida	Fla. Stat. § 240.551(1), (3)	suit filed by CSB
Illinois	110 Illinois Comp. Stat. 979/1 *et seq.*	threatened by CSB
Maryland	Md. Code § 18-1902 *et seq.* (1997)	threatened by CSB
Massachusetts	Mass. Gen. Laws 15C	
Michigan	Mich. Comp. Laws Ann. § 390.1427 (West 1988)	threatened by CSB

State	Law	Litigation
Mississippi	Miss. Code § 37-355-i *et seq.*	threatened by CSB
Nevada	Nev. Rev. Stat. Chap. 353(B)	threatened by CSB
Ohio	Ohio Rev. Code Ann. 3334.02 (1990 & Supp. 1994)	threatened by CSB
Pennsylvania	Pa. Cons. Stat. § 6901.309(c)(1992)	
South Carolina	S.C. Code Ann. § 59-4-10; Budg. & Contol. Regs R. 19-2000 *et seq.*	threatened by CSB
Tennessee	Tenn. Code Ann. § 49-7-801 (1998)	
Texas	Tex. Code Ann. § 54.633 (1995)	threatened by CSB
Virginia	Va. Code Ann. § 23-38.75 *et seq.*	threatened by CSB
Washington	Wash. Rev. Code 28B.95.010 *et seq.*	

State	Law	Litigation
West Virginia	West.Va. Code § 1830 *et seq.*	threatened by CSB
Wyoming	Wyo. Stat. § 21-16-502 (1991)	

APPENDIX B

WAIVER OF SOVEREIGN IMMUNITY AND TAKINGS, INVERSE CONDEMNATION AND TORT CLAIMS PROVISIONS IN STATE LAW

State	Waiver	Takings, inverse condemnation or general tort actions
Alabama	No waiver in court	Ala. Const. Art. I § 23 (takings) Code of Ala. § 41-9-60 *et seq.* (general claims against State; administrative commission)
Alaska	A.k. Const. Art. II §21	A.k. Const. Art. I § 18; Stat. 9.50.250 (tort claims)
Arizona		Ariz. Const. Art. II § 17 (takings); A.R.S. §11-972 (inverse condemnation)
Arkansas	no waiver	Ark. Const. Art. 2, § 22 (takings)

State	Waiver	Takings, inverse condemnation or general tort actions
California	Cal. Const. Art III § 5	Cal. Const. Art I, § 19; Code of Civ Proc. §§1250.110, 1268.350 (inverse condemnation)
Colorado	C.R.S. 24-10-104, 105, 106 (tort)	C.R.S. 24-56-116 (inverse condemnation)
Connecticut		Conn. Const. Art. I, §10 (1997) (open courts); §11 (1997) (takings); Conn. Gen. Stat. § 48-17b (inverse condemnation)
Delaware	Del. Const. art I, §9 (1998)	10 Del. C. § 4000 *et seq.* (1998) (tort claims act); 10 Del. C. Ch. 61 § 6101-15 (1998); 29 Del. C. Ch. 95, § 9504 (1998) (inverse condemnation)

State	Waiver	Takings, inverse condemnation or general tort actions
Florida	Fl. Stat. § 768.28	Fla. Const. Art. I, § 9, Art. X, § 6(a) (takings); Fla. Stat. §11.065 (claims bill); *Jacob's Wind Elec. Co. v. Florida Dept. of Transp.*, 626 So. 2d 1333 (takings applied to patent infringement).
Georgia	Ga. Const. Art. I § II, para. IX (1998) (tort claims); O.C.G.A. §50-21-1 *et seq.* (1998) (contract)	O.C.G.A. §50-21-1 *et seq.* (1998) (contract)
Hawaii	H.R.S. § 662-2 (1998) (torts)	H.R.S. §113-4 (1998) (inverse condemnation) H.R.S. § 662-2 (1998) (torts)
Idaho	Idaho Code §6-901 et seq.	Idaho Const. Art I §14 (1998)

State	Waiver	Takings, inverse condemnation or general tort actions
Illinois	Ill. Const. Art. 13, § 4(1998)	Ill. Const. Art 1 § 15 (1998) (takings) 705 ILCS 505/8 (1998) (tort claims)
Indiana	Ind. Const. Art. 4, § 24	Ind. Const. Art. 1, § 21 (1998)
Iowa		Iowa Code § 25.1 *et seq.* (1997) (general claims); Iowa Code § 669.1 *et seq.* (1997) (tort claims)
Kansas		K.S.A. § 60-614 (1997) (takings); K.S.A. § 75-6013 (1997) (tort claims)
Kentucky	Ky. Const. § 231	K.R.S. § 44.072 (1996) (tort claims)
Louisiana	La. R.S. 24:152 (1998)	La. R.S. 34:1538 (1998) (tort claims)

State	Waiver	Takings, inverse condemnation or general tort actions
Maine	14 M.R.S. § 8104-A (1997) (tort)	14 M.R.S. § 8101 *et seq.* (1997) (tort claims)
Maryland	Md. State Govt. Code Ann. § 12-101 *et seq.* (1998); § 5-522 (tort claims)	Md. Code. Ann. §IL-101 *et seq.* (1998) (tort claims)
Massachusetts		Mass. Ann. Laws ch. 258, § 1 *et seq. (1998)* (tort claims)
Michigan		MSA Const. 1963, Art. X § 2 (1999) (takings)
Minnesota	Minn. Stat. Ann § 3.751 (1998) (contracts only)	Minn. Stat. Ann. § 3.736 (1998) (tort claims)
Mississippi	Miss. Code Ann. § 11-46-5 (1998)	Miss. Const Ann. Art. 3 §17 Miss. Code Ann. § 43-37-9 (1998)

State	Waiver	Takings, inverse condemnation or general tort actions
Missouri	§ 537.610 R.S. Mo. (1997) (up to $1 million)	
Montana	Const. Art. II §18; Mont. Code. Anno. §2-9-102 (1998)	Mont. Code Anno. §2-9-102 (1998)
Nebraska	Neb. Const. Art. 5, § 22 (1998); R.R.S. Neb. § 81-8,215	R.R.S. Neb. § 81-8,209 *et seq.* (tort claims)
Nevada	N.R.S. 41.031	N.R.S. 37.110
New Hampshire	N.H.R.S.A. 541-B:1 *et seq.*	N.H. Const. pt. 1 art. 2,12. (takings); *Burrows v. City of Keene*, 432 A.2d 15 (1981) N.H.R.S.A. 541-B:1 *et seq.* (tort & property claims).
New Jersey	N.J.Stat. § 59:1-1 *et seq.* (1998)	N.J.Stat. § 59:1-1 *et seq.* (1998)

State	Waiver	Takings, inverse condemnation or general tort actions
New Mexico	N.M. Stat. Ann. § 41-4-1 *et seq.* (1998)	N.M. Stat. Ann. N.M. Stat. Ann. § 42a-1-1 *et seq.* (1998) (condemnation) § 41-4-1 *et seq.* (1998) (tort claims)
New York	N.Y. Ct. Cl. Act § 9(2) (McKinney 1989)	N.Y. Ct. Cl. Act § 9(2) (McKinney 1989)
North Carolina	*De Bruhl v. State Highway and Public Works Comm.* 247 N.C. 671 (1958);	Const. Art.I, Sec. 19 (takings); N.C. Gen. Stat. § 40A-51 (inverse condemnation) (1997)
North Dakota	Judicially abolished; *Bulman v. Hulstrand* Co., 521 N.W. 2d 632	N.D. Cent. Code § 32-15-32 (1998)

State	Waiver	Takings, inverse condemnation or general tort actions
Ohio	O.R.C. 2743.02	Ohio Const. Art. I §19 (takings); O.R.C. 2743.01 *et seq.* (1998) (general)
Oklahoma	51 Ok. St. § 152.1 (1998)	Okla. Const. Art. II, §24 (takings) 51 Okl. St. §151 *et seq.* (1998) (tort claims)
Oregon	Or. Rev. Stat. Ann. § 30.265 (1997)	Or. Const. section 18, Art. I; section 4, Art XI; Or. Rev. Stat § 20.085 (inverse condemnation); Or. Rev. Stat. § 30.260 *et. seq.* (1997) (tort claims)
Pennsylvania	1 Pa.C.S. §2310 (1998)	
Rhode Island	R.I. Gen Laws § 9-31-1 (1998)	R.I. Gen. Laws §9-31-1 (1998) (tort claims)

State	Waiver	Takings, inverse condemnation or general tort actions
South Carolina	S.C. Const. Ann. Art. XVII §2 (1998); S.C. Code Ann. §15-78-20 (1998)	S.C. Const. Ann. Art. I, §13 (1998); S.C. Code Ann. §15-78-20 (1998)
South Dakota		S.D. Const. Art. VI, §13 (1999) (takings)
Tennessee	Tenn. Const. art. I, §17 (1998)	Tenn. Code Ann. § 29-20-404 (1998)
Texas	Tx. Civ. Prac. & Rem. Code §101.025 (1999) (tort claims)	Const. Art. I Sec. 17 (takings); Tx. Civ. Prac. & Rem. Code §101.025 (1999) (tort claims)
Utah	Ut. Const. Art. I, § 22 Utah Code Ann. § 63-30-10.5(1997)	Ut. Const. Art. I, § 22; Utah Code Ann. §63-30-10.5 (1997)

State	Waiver	Takings, inverse condemnation or general tort actions
Vermont	29 V.S.A. §1403 *et seq.*	Vt. Const. Ch. I, art. 2 (1998) (takings); 19 V.S.A. §512 (1998) (takings and inverse condemnation); 12 V.S.A. § 5601 (1998) (tort claims)
Virginia	Va. Const. Art. I § 11 (inverse condemnation)	Va. Code Ann. §8.01-187 (inverse condemnation)
Washington	Wash. Const. Art. II, §26	Rev. Code Wash. § 4.92.090 (tort claims)
West Virginia	no waiver	
Wisconsin	Wis. Const. Art. IV, §27 (general); Wis. Const. Art. I, §13 (takings)	Wis. Const. Art. I, §13 (takings)

State	Waiver	Takings, inverse condemnation or general tort actions
Wyoming	Wyo. Const. art 1, §8	Wyo Stat. §1-26-516 (inverse condemnation); Wyo. Stat. §1-39-102 (1999)